Supreme Court, U.S.
FILED

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No. OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

ROSE A. DONOVAN and CHARLES A. DONOVAN,
as Parents of TRALANE DONOVAN,

Petitioners,

vs.

SECRETARY OF THE DEPARTMENT OF HEALTH
AND HUMAN SERVICES,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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38 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether the United States Court of Appeals for the Federal Circuit erred when it affirmed the decision of the United States Court of Federal Claims which determined it had no power to grant petitioners' motion for post-judgment relief under RCFC 60(b), thus abrogating the power inherent in this provision allowing post-judgment relief.

2. Whether the United States Court of Appeals for the Federal Circuit erred when it affirmed the decision of the United States Court of Federal Claims which held that the Special Master was acting within his powers under the Vaccine Act, 42 U.S.C.A. Section 300aa, et seq., when he issued "sua sponte" suspensions of the proceedings, contrary to Section 12(d) et seq. of the Act, and when contrary to Congressional intent, he exceeded the

mandatory time periods applicable to decisions by Special Masters, pursuant to Section 12(g) of the Vaccine Act.

LIST OF PARTIES

The names of all parties to the proceedings in the court whose judgment is sought to be reviewed here appear in the caption of the case.

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In The

Supreme Court of the United States

October Term, 1994

NO. _____

ROSE A. DONOVAN and CHARLES A. DONOVAN,
as Parents of TRALANE DONOVAN,

Petitioners,

v.

SECRETARY OF THE DEPARTMENT OF HEALTH
AND HUMAN SERVICES,

Respondent.

**PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT**

REPORTS OF OPINIONS BELOW

The Order of the United States Court of Federal Claims is officially reported as Donovan v. Secretary of DHHS, 28 Fed. Cl. 459 (1993) and appears in Appendix A hereto at page 1. The Judgment of the United

States Court of Appeals for the Federal Circuit, dated January 5, 1994, affirming the Claims Court's decision, is not published and appears in Appendix B hereto at page 13. The Order of the United States Court of Appeals for the Federal Circuit, dated February 14, 1994, denying the petitioner's Petition for Rehearing, and declining the petitioner's suggestion for a Rehearing in Banc, is not published and appears in Appendix C hereto at page 14.

GROUNDS OF THIS COURT'S JURISDICTION

The decision of the Court of Appeals for the Federal Circuit was entered on January 5, 1994. A timely petition for rehearing and suggestion for rehearing in banc, filed January 18, 1994, was denied on February 14, 1994.

Jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1). The courts below had jurisdiction of this

matter pursuant to 42 U.S.C. Section 300aa-12(f), to review the judgment of the United States Court of Federal Claims, and pursuant to Rule 60(b) of the Rules of the United States Court of Federal Claims, for post-judgment relief.

STATEMENT OF THE CASE

STATEMENT OF FACTS

In 1987, Tralane Donovan (an eight year old infant) and his parents, brought suit in the New York State Supreme Court, Bronx County, seeking damages for neurological injuries that Tralane suffered as a result of the administration in 1979 of diphtheria-pertusis-tetanus vaccinations (DPT vaccine). Included in that suit were the doctor who administered the vaccine and the vaccine manufacturer. In 1990, the Donovans filed a petition under the Vaccine

Act[1] and withdrew the state action, in accordance with the provisions of the Act.

The Donovan claim was suspended for 60 days, with other "unassigned" cases on December 11, 1990 by the chief special master. On May 3, 1991, the claim was again suspended for the "maximum number of days" permitted by the Vaccine Act. (At that time the Act permitted the chief special master to suspend cases no more than 180 days, thus adding another 120 days to the first 60 day suspension.[2]) This suspension by the chief special master meant that this claim had to be decided by the special master no later than 420 days

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[1]References to the "Vaccine Act", or to the "Act" herein refer to the National Childhood Vaccine Injury Act, 42 U.S.C.A. Section 300aa-1 et seq., (West 1991 & Supp 1992)

[2]The number of days was increased to 540 in November, 1991, Pub. L. No. 102-168, Title II, Section 201(c), 105 Stat. 1102, 1003 (1991).

after the petition was filed, or by November 8, 1991.

Special Master Edwards suspended this proceeding again, by order dated November 1, 1991, for 60 days, and then again, by order dated January 2, 1992, for another 60 days.

On January 23, 1992, Special Master Edwards issued his decision denying the petitioner's request for compensation under the Vaccine Act. Petitioner's counsel did not seek review of the special master's decision and at the expiration of the time period for review, on February 25, 1992, the Clerk of the Court automatically entered a judgment based on the special master's decision.

Petitioner's counsel did not receive a copy of the judgment from the court, or from any other source, and thus did not file any election (as provided by the

Vaccine Act) to reject the judgment and to reinstate the state court action within the statutory 90 day period.

PRIOR PROCEEDINGS

On December 29, 1992, petitioners submitted a motion under RCFC 60(b) seeking to vacate the judgment of the United States Court of Federal Claims, entered February 25, 1992. In support of the motion, petitioners argued that the special master's purported suspensions were invalid because they were not issued on the motion of any party. Further, the additional two "suspensions" of 60 days each, extended the pendency of the petition beyond the permitted 420 days. As a result, petitioners argued that the special master was required under rule 12(g) of the Act to give notice to petitioners of their right to withdraw from the program. Further, since they were not given the requisite

notice prior to the entry of judgment, petitioners argued that they were entitled to be given notice and the opportunity to withdraw notwithstanding the entry of the judgment on the special master's decision.

In the alternative, petitioners sought vacatur of the judgment under RCFC 60(b) for the limited purpose of immediately re-entering it, so that a notice of rejection of the judgment can be filed, pursuant to section 21(a) of the Act, thus allowing petitioners to continue to pursue the state court action.

Judge Nettesheim, in Donovan v. Secretary of DHHS, 28 Fed. Cl. 459 (1993) declined to exercise jurisdiction over the petitioners' motion. The court concluded that Widdoss v. Secretary of DHHS, 989 F.2d 1170 (Fed. Cir. 1993), prohibits the Court of Federal Claims from taking any action whatsoever in a Vaccine act case outside

the section 12(e) review process, and that the Court of Federal Claims could not use RCFC 60(b) in Vaccine Act cases. Judge Nettesheim then vacated Special Master Edwards' assignment of petitioners' motion to the Court of Federal Claims and remanded the motion to the special master with instructions to deny the motion. Special Master Edwards issued an order denying the motion and a judgment was entered on this order. Petitioners filed their petition for review with the United States Court of Appeals for the Federal Circuit. The Circuit Court affirmed the Claims Court, denied a petition for rehearing, and declined the suggestion for a rehearing in banc.

This petition follows.

REASONS FOR GRANTING THE WRIT

It is respectfully submitted that Certiorari should be granted for the following reasons:

1. The lower court's refusal to extend jurisdiction and grant post judgment relief by vacating its own judgment under RCFC Rule 60(b) was a misapplication of the rules relative to the review power of the court and ignores the power of RCFC 60(b), to permit the Claims Court to review its own decisions and judgments.

The sole relief sought under RCFC Rule 60(b) was to have the judgment vacated for the limited purpose of allowing the petitioners to reinstate their state cause of action. Petitioners did not seek to challenge the merits of the special master's decision, or to further pursue any claims against the respondent in this proceeding. RCFC Rule 60(b) gives the

district court a 'grand reservoir of equitable power to do justice in a particular case. "Though not a substitute for appeal ... the rule should be liberally construed when substantial justice will thus be served." (Citations omitted). Radack v. Norwegian America Line Agency, Inc., 318 F.2d 538, 542 (2nd Cir. 1963). Unlike the petitioners in Widdoss v. Secretary of DHHS, 989 F.2d 1170, (Fed.Cir. 1993) the petitioners here do not seek to extend their time to appeal or to review the decision below on its merits, rather petitioners seek an opportunity to exercise their right to return to the state court action, relief provided by the Vaccine Act itself, and denial of this right will certainly deprive them of "substantial justice". In G. Heileman Brewing Co., Inc. v. U.S., 792 F. Supp 823 (Ct. Int'l Trade 1992) plaintiff sought an Order vacating an

Order of Dismissal for failure to prosecute, basing its application on the claim that it never received certain notification of the transfer of the case to the Suspension Disposition Calendar nor of the notice of the dismissal of the case for its failure to remove the case from the Suspension Disposition Calendar. The court held that "... rule 60(b)(6) provides a most appropriate rationale to approach Heileman's dilemma" Id at 824, and vacated the Order of Dismissal, and restored the case to the Suspension Disposition Calendar, thus returning the parties to the status-quo prior to the dismissal of the case. Patton v. Secretary of DHHS, 28 Fed.Cl. 532 (June 4, 1993) stated that:

> While the court recognizes that it cannot invoke RCFC 60(b) to review the merits of a special master's decision in the absence of a timely motion for review [citing Widdoss], the court does not interpret the Widdoss decision or the Vaccine Act as precluding the court from

> invoking RCFC 60(b) to relieve a party from a judgment for the limited purposes listed in this rule.

Id at 539, n. 13.

This is the relief the petitioners herein seek. A restoral of the respective positions of the parties **prior** to the entry of judgment, for the sole purpose of allowing petitioners to withdraw from the Vaccine Act compensation program by electing to reject the judgment and then reinstate their New York state action.

2. The Special Master had no authority to issue sua sponte suspension orders which extended the consideration of the petition beyond the statutorily defined period. Such extensions made the decision untimely and which entitled the petitioner to be notified that the petition may be withdrawn from consideration.

The Special Master acted without jurisdiction when he exceeded the time limitations built into Rule 12 of the Vaccine Act, and contrary to Congressional intent, allowed the petition proceedings to extend for 497 days, 76 days in excess of the statutorily set time period.

When the Vaccine Act was first adopted, Congress stressed that it was to provide an "expeditious" alternative compensation system for those injured by routine pediatric vaccinations. The Committee report accompanying the

legislation states that the speed of the compensation program was one of the features that Congress anticipated would "divert a significant number of potential plaintiffs from litigation." See H.R. Rep. No. 908, 99th Cong., 2nd Sess. 12 (1986), reprinted in 1986 U.S.C.C.A.N 6344, 6353. The Act was to provide a "relatively fast" remedy. See Carlson v. Secretary of DHHS, 23 Cl. Ct. 788, 791 (1991). To this end, the Act set mandatory time limits for decisions by special masters and the Court of Federal Claims. Section 12(g)(1) of the Vaccine Act provides that if the special master does not render his decision within the permitted time period, he must give the petitioner written notice of his (the petitioner's) option to continue the proceedings or to withdraw the petition.

Section 12(d)(3)(A) of the Act provides that every petition for

compensation must be decided by the special master as "expeditiously" as possible, but in no event later than 240 days after the petition is filed, exclusive of any "suspensions" authorized by the statute. Suspensions may, under certain circumstances, be issued by either the special master or by the chief special master. Such suspensions may be issued on the "motion" of either petitioner or respondent.

The Joint Statement of Explanation of Amendment to the National Vaccine Injury Compensation Program makes clear that because meeting the deadlines described above was so "basic" to the program, a failure by the special master or the Court to timely decide would result in a loss of jurisdiction to consider the petition:

> ...Additionally, <u>if a special master or court has failed to meet the prescribed deadline, the special master or court will lose</u>

> jurisdiction over the petition 30 days after the notice to the petitioner has been issued. 136 Cong. Rec. H. 9729 (daily ed. Oct. 15, 1990)

The 1991 revision of vaccine Act Rule 21(b) did not diminish the protections afforded petitioners under sections 12(g) and 21(b). Congress's intention to allow petitioners after being informed of their right to withdraw, to elect to continue the proceedings does not undercut the petitioner's right to withdraw should she choose to do so. Therefore it continues to be appropriate to treat any failure to give notice as a jurisdictional defect whose existence can be raised even after a decision has been entered.

CONCLUSION

For these reasons, a writ of certiorari should be issued to review the opinion and judgment of the United States Court of Appeals for the Federal Circuit.

Respectfully submitted,

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May 11, 1994

APPENDIX A - ORDER OF THE UNITED STATES COURT OF FEDERAL CLAIMS

DATED MAY 10, 1993
AS CORRECTED MAY 26, 1993

Christine Cook Nettesheim, Judge

Rose A. and Charles A. DONOVAN, as parents of Tralane Donovan,

Petitioners,

v.

Secretary of the Department of Health and Human Services,

Respondent.

No. 90-997V.

ORDER

This matter is before the court on a special master's assignment of motion to vacate judgment filed under RCFC Rule 60(b). Respondent requests that petitioners' motion be denied. Argument is deemed unnecessary.

FACTS

On September 14, 1990, Charles A. and Rose A. Donovan ("petitioners"), as

parents of Tralane Donovan, filled a petition in the United States Claims Court alleging that Tralane suffered symptoms and manifestations of an encephalopathy and of a residual seizure disorder within three days after he received diphtheria-pertussis-tetanus vaccinations on April 24, 1979, and June 14, 1979. Petitioners sought compensation under the National Childhood Vaccine Injury Act of 1986, 42 U.S.C. ss 300aa-1 - 300aa-34 (1988), as amended by several public laws, codified in 42 U.S.C.A. ss 300aa-1 - 300-aa-34 (West Supp.1992) (the "Vaccine Act-").

After discussing thoroughly the deficiencies in the petition during two comprehensive and substantive conferences with the parties, Special Master John F. Edwards determined that petitioners had failed to establish a prima facie case and

subsequently entered his decision denying entitlement. Donovan v. Secretary of DHHS, No. 90-997V (Cl. Ct. Spec. Mstr. Jan. 23, 1992). The special master directed the Clerk of the Court to enter judgment dismissing the petition. Since neither party sought review of the decision on entitlement as provided by RCFC Appendix J, the Clerk entered judgment on February 25, 1992.[1]

On January 4, 1993, petitioners submitted a RCFC Rule 60(b) motion to vacate judgment.[2] On March 15, 1993, the

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[1] RCFC Appendix J Rule 11(a) states that in the absence of the filing of a motion for review within 30 days of the filing of the special master's decision, or prior to the expiration of such period, each party may file a notice stating that it will not seek such review. In such a case, the Clerk shall forthwith enter judgment in accordance with the special master's decision.

[2] RCFC Rule 60(b)(6) provides, in relevant part, that the court may relieve a party from a final judgment for any reason justifying relief from the opera-

special master directed the Clerk to assign petitioners' motion to vacate judgment to a Court of Federal Claims judge.

DISCUSSION

The Court of Federal Claims' jurisdiction in vaccine cases is defined by the Vaccine Act itself. See UNR Industries, Inc. v. United States, 962 F.2d 1013, 1025 (Fed.Cir.), cert. granted, --- U.S. ----, 113 S.Ct. 373, 121 L.Ed.2d 285 (1992). Section 12(e) of the Vaccine Act, entitled "Court Jurisdiction," delimits the scope of the court's jurisdiction. See Widdoss v. Secretary of DHHS, 989 F.2d 1170-1177 (Fed.Cir.1993) ("[T]he claims court's jurisdiction to hear appeals under the Vaccine Act is 'unambiguously circumscribed by the plain language of [section 300aa-12(e)(2)]....' ") (quoting Wilson

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tion of the judgment.

v. Secretary of DHHS, 23 Cl.Ct. 169, 171 (1991), aff'd, 960 F.2d 156 (Fed.Cir.1992) (Table)). That provision of the Vaccine Act conditions the court's jurisdiction on the filing of a motion for review within 30 days after the issuance of a special master's decision. See 42 U.S.C.A. s 300aa-12(e). When a party does not comply with the 30-day time period for filing a motion for review with the Court of Federal Claims, "the clerk's entry of judgment ends the matter....", and the party thus waives the right of appeal to the Court of Federal Claims. Grimes v. Secretary of DHHS, 988 F.2d 1196-1198 (Fed.Cir.1993).

In this case petitioners did not seek a timely review in the Court of Federal Claims. Upon expiration of the 30-day time limit, the Clerk entered judgment as required by statute. Having taken no action within the statutory time limit for

appeal, petitioners have no option to seek review in this court.

The court also lacks jurisdiction to consider petitioners' motion to vacate judgment as filed under RCFC Rule 60(b). In Widdoss v. Secretary of DHHS, 24 Cl.Ct. 547, 552 (1991), rev'd, 989 F.2d 1170, the trial court granted petitioners' Rule 60(b) motion for relief from judgment reflecting its view that such relief is "clearly allowable under the Vaccine Rules and in accordance with the spirit and purpose of the Vaccine Act." (Citation omitted.) However, since the issuance of the special master's order of referral, the United States Court of Appeals for the Federal Circuit reversed the Court of Federal Claims' acquiescence to jurisdiction in that case.

The 30-day time period is jurisdictional, so application of RCFC Rule 60(b)

to authorize the court to review petitioners' motion is of no effect since a court rule cannot be used to escape a jurisdictional limitation. Widdoss, at 1177. Finally, it is settled law in the Federal Circuit that RCFC Rule 60(b) "cannot be employed to toll, extend, or waive the time period in which to appeal." Id., at 1178.

The special master referred petitioners' motion to the Court of Federal Claims because the rules governing the procedures before the Office of the Special Master did not provide for a Rule 60(b) to offer a petitioner relief from judgment. The withholding of such authority was calculated. When the Claims Court promulgated the rules for the Office of Special Masters, it confronted an unprecedented type of review embodied in the Vaccine Act. As originally enacted, the

Vaccine Act provided for two levels of factfinding. As administrative fact-finder, the special master initially found facts; the Claims Court was required to review them de novo. See Davis v. Secretary of DHHS, 19 Cl. Ct. 134, 140-41, (1989); see also Bradley v. Secretary of DHHS, 991 F.2d 1570, 1572 (Fed.Cir.1993) (Plager, J., concurring in part and dissenting in part). Further review by the Court of Appeals for the Federal Circuit presumably was to be administered under the arbitrary and capricious standard.

Congress amended the Vaccine Act to restrict the Court of Federal Claims' review consistent with the arbitrary and capricious standard. 42 U.S.C.A. 300aa--12(e)(2); see Hale v. Secretary of DHHS, 22 Cl.Ct. 403, 415 (1991). This development regularized the review consistent with judicial review of other administra-

tive factfinders. This solution posed a problem to the appeals court, recently addressed at length in Bradley, 991 F.2d at 1574 n. 3 & 1576 n. 4 (Plager, J., concurring in part and dissenting in part, at 1-6). The conundrum presented is whether appellate court review of a Court of Federal Claims judgment is de novo, which devolves to reviewing the decision of a special master directly to see whether it was arbitrary and capricious, or whether the review is based on the arbitrary and capricious standard. This seemingly semantic distinction is of significant practical import to the fisc, on the one hand, and to the Court of Federal Claims, on the other. The interests of the taxpayer are implicated, because the taxpayer is paying for petitioners' judicial review through the appellate process. It is altogether unprecedented that Congress would fashion

an appeals system that encourages successive redundant judicial review, while providing a mechanism for reimbursing the attorneys' fees of private parties employing that process. 42 U.S.C.A. s 300aa-15(-e)(1); Hines v. Secretary of DHHS, 26 Cl.Ct. 114 (1992). Although it is true that the Vaccine Act sets up a trust fund that ostensibly pays for judgments, this trust fund does not reimburse the Government for legal services expended by the Department of Health and Human Services and the Department of Justice in defending against petitions for review.

It is the court's duty to carry out faithfully the dictates of Congress, and no one has suggested that the court has been less than scrupulous in adhering to the requirements of the Vaccine Act. As the concurring and dissenting opinion in Bradley makes clear, however, the effect

of the current appellate review is to duplicate the task assigned to the Court of Federal Claims. In other words, the appellate court re-reviews all the work of special master that has been reviewed by the Court of Federal Claims in order to determine whether the judgment of the Court of Federal Claims should stand. Whether Congress intended this precise result can be debated, as Bradley dramatizes. Nonetheless, it is a fact that this result obtains at present and results in an obvious duplication of judicial resources. It would appear that the one prescient act taken by the Claims Court in implementing the Vaccine Act was to foreclose Rule 60(b)-type relief, in that no reason exists to afford petitioners in Vaccine Act cases three bites at the apple, when they have been granted, with the potential for reimbursement of attorneys'

fees and costs, two opportunities for the same judicial review.

CONCLUSION

Based on the foregoing, the special master's assignment of petitioners' motion to the Court of Federal Claims is vacated, and the matter is remanded to the special master with instructions to deny the motion. No costs on review.

/signature/
Christine Cook Nettesheim
Judge

APPENDIX B - JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT
DATED JANUARY 5 1994

93-5159

ROSE A. DONOVAN and CHARLES A. DONOVAN, as Parents of TRALANE DONOVAN,

Petitioners-Appellants,

v.

SECRETARY OF THE DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Respondent-Appellee.

JUDGMENT

On Appeal from the United States Court of Federal Claims, in Case No. 90-997V,

This Cause having been heard and considered, it is Ordered and Adjudged:

Per Curiam (LOURIE, Circuit Judge, COWEN, Senior Circuit Judge, and CLEVENGER, Circuit Judge):

AFFIRMED. See Fed. Cir. R. 36

Dated Jan. 5, 1994

/signature/
Francis X. Gindhart
Clerk

(stamp)
FILED

APPENDIX C - ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT
DATED FEBRUARY 14, 1994

93-5159

ROSE A. DONOVAN and CHARLES A. DONOVAN, as Parents of TRALANE DONOVAN,

Petitioners-Appellants,

v.

SECRETARY OF THE DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Respondent-Appellee.

ORDER

A combined petition for rehearing and suggestion for rehearing in banc having been filed by the APPELLANT, and the petition for rehearing having been referred to the panel that heard the appeal, and thereafter the suggestion for rehearing in banc having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the suggestion for rehearing in banc be, and the same hereby is, DECLINED.

The mandate of the court will issue on February 22, 1994.

FOR THE COURT
FRANCIS X. GINDHART
CLERK

Dated: February 14, 1994
By /signature/

Diane M. Frye
Chief Deputy Clerk

cc: NATHAN M. BELOFSKY
CAROLINE GOSSE ELMENDORF

U.S. COURT OF APPEALS
DONOVAN V HHS, 93-5159
FOR THE FEDERAL CIRCUIT
(CFC - 90-997V)
FEB 14 1994

FRANCIS X. GINDHART
CLERK

Note: Pursuant to Fed. Cir. R. 47.6, this order is not citable as precedent. It is a public record.

(2)

Supreme Court, U.S.
FILED
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No. 93-1950

In the Supreme Court of the United States

OCTOBER TERM, 1994

ROSE A. DONOVAN and CHARLES A. DONOVAN,
PARENTS OF TRALANE DONOVAN, PETITIONERS

v.

DONNA E. SHALALA,
SECRETARY OF HEALTH AND HUMAN SERVICES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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39 pp

QUESTION PRESENTED

Whether the court of appeals erred in affirming the Court of Federal Claims' refusal to grant post-judgment relief in this Vaccine Act case.

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In the Supreme Court of the United States

OCTOBER TERM, 1994

No. 93-1950

ROSE A. DONOVAN and CHARLES A. DONOVAN,
PARENTS OF TRALANE DONOVAN, PETITIONERS

v.

DONNA E. SHALALA,
SECRETARY OF HEALTH AND HUMAN SERVICES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The per curiam judgment of the court of appeals (Pet. App. 13) is unpublished, but the decision is noted at 17 F.3d 1442 (Table). The decision of the United States Court of Federal Claims (Pet. App. 1-12) is reported at 28 Fed. Cl. 459.

JURISDICTION

The judgment of the court of appeals (Pet. App. 13) was entered on January 5, 1994. A petition for rehearing was denied on February 14, 1994. Pet. App. 14-15. The petition for a writ of certiorari was

filed on May 16, 1994 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. In 1986, Congress created the National Vaccine Injury Compensation Program through enacting the National Childhood Vaccine Injury Act (Vaccine Act or Act), 42 U.S.C. 300aa-10 *et seq.* The Act establishes a compensation system for persons alleging injury from certain routine pediatric vaccines. To further the public interest in encouraging the availability and use of those vaccines, the Act offers an alternative to traditional tort actions against vaccine administrators and manufacturers. The Act's no-fault nature and its less formal system for processing claims are designed to attract potential litigants by offering swifter and more accessible compensation than traditional tort litigation. The Secretary of the Department of Health and Human Services is the named respondent in claims filed under the Act.

The Act created an Office of Special Masters to adjudicate claims. 42 U.S.C. 300aa-12(c)(1) (Supp. IV 1992). The special masters have been given broad discretion by Congress to conduct proceedings in an expeditious and streamlined manner. 42 U.S.C. 300aa-12(d) (1988 & Supp. IV 1992). As opposed to the formal, fully adversarial nature of civil litigation, proceedings under the Vaccine Program are informal and flexible. H.R. Rep. No. 247, 101st Cong., 1st Sess. 510, 514-515 (1989). The Federal Rules of Civil Procedure and the Federal Rules of Evidence do not apply to those proceedings, and there is no routine formal discovery. 42 U.S.C. 300aa-12(d)(2) (Supp. IV 1992). Instead, Congress

directed the Court of Federal Claims to promulgate special rules of procedure for vaccine litigation. 42 U.S.C. 300aa-12(d)(2); see Ct. Fed. Cl. R. (RCFC) Appendix J, Vaccine Rules.[1] The Vaccine Rules provide for streamlined proceedings in which procedural issues are frequently handled off-the-record through status conferences between the parties and the special masters, and through informal dealings between the parties. See, *e.g.*, Vaccine Rule 8(c). Further, the special masters determine the format for hearing argument in each case. Vaccine Rule 8(a). The above approach seeks to provide petitioners with a "quick and certain conclusion of proceedings" on their claim. H.R. Rep. No. 908, 99th Cong., 2d Sess. 17 (1986).

b. A claimant seeking recovery under the compensation program initiates a proceeding for compensation by filing a petition with the United States Court of Federal Claims. 42 U.S.C. 300aa-11(a)(1) (1988 & Supp. IV 1992). By statute, a special master's decision must be issued within 240 days of the date the petition is filed, excluding periods of suspension. 42 U.S.C. 300aa-12(d)(3)(A)(ii) (1988 & Supp. IV 1992). The Chief Special Master has the discretion to suspend proceedings on any petition for up to 30 months. Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, § 13632(c), 107 Stat.

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[1] Pursuant to the Act's instructions, the Vaccine Rules were recommended by the Office of Special Masters and promulgated by the Court of Federal Claims. 42 U.S.C. 300aa-12(d)(2) (Supp. IV 1992). They are published at RCFC App. J.

646.[2] The special master presiding over the petition may further suspend proceedings for an additional 180 days. 42 U.S.C. 300aa-12(d)(3)(C) (1988 & Supp. IV 1992). Whether authorized by the Chief Special Master or the presiding special master, a suspension tolls the deadline for issuing the special master's decision. In all other respects, the case continues to go forward. *Widdoss* v. *Secretary of HHS*, 989 F.2d 1170, 1175 (Fed. Cir.), cert. denied, 114 S. Ct. 381 (1993). After the special master issues a written decision, final judgment is entered in thirty days unless one of the parties files a motion for review to the Court of Federal Claims. 42 U.S.C. 300aa-12(e)(1) (Supp. IV 1992).

c. Within 90 days after judgment is entered, petitioners are required to file an election either to accept or reject judgment. 42 U.S.C. 300aa-21(a) (1988 & Supp. IV 1992). This election forces petitioners either to accept the outcome of proceedings on their petition, thereby foreclosing any right to institute a civil action for damages, or to reject the Court of Federal Claims' decision, thereby preserving their civil action options. 42 U.S.C. 300aa-21(a). An election is required even when the special master declines to award any compensation. 42 U.S.C. 300aa-21(a)(2). Petitioners are deemed to have accepted the outcome if they have not affirmatively made an election within 90 days of judgment. 42 U.S.C. 300aa-21(a).

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[2] Prior to November 26, 1991, the maximum suspension time available to the Chief Special Master was 180 days. Health Information, Health Promotion, and Vaccine Injury Compensation Amendments of 1991, Pub. L. 102-168, Tit. II, § 201(c), 105 Stat. 1102-1103 (1991).

The Act provides no mechanism for rescinding an election.

2. a. On September 14, 1990, Rose A. Donovan and Charles A. Donovan filed a petition for compensation under the Vaccine Act on behalf of their son, Tralane Donovan. Pet. App. 1-2. On December 11, 1990, and on May 3, 1991, the Chief Special Master issued General Orders suspending groups of cases, including this one, for 60 days and 120 days, respectively, using the authority conferred by Section 300aa-12(d)(3)(D). See C.A. App. JA52-JA54. Based on those orders, the decisional deadline was extended to November 8, 1991. On October 29, 1991, an order was issued assigning this case to Special Master John F. Edwards. C.A. App. JA36.[3] On November 1, 1991, Special Master Edwards issued an order suspending proceedings on the petition for 60 days for "good cause shown." C.A. App. JA55; see 42 U.S.C. 300aa-12(d)(3)(C) (1988 & Supp. IV 1992); Vaccine Rule 9. On January 2, 1992, Special Master Edwards issued another order suspending proceedings on the petition for an additional 60 days, again for "good cause shown." C.A. App. JA56. Together, those suspensions extended the statutory time period in which the special master was required to reach a decision to March 7, 1992. 42 U.S.C. 300aa-12(d)(3)(A)(ii) (1988 & Supp. IV 1992).

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[3] The petition had previously been assigned first to Special Master Dennis Hauptly and then to Special Master Paul Baird, before finally being reassigned to Special Master John Edwards. C.A. App. JA36. Neither Special Master Hauptly nor Baird exercised his power to suspend the decision due date in this case case during the brief time it was on his docket.

After conducting two comprehensive and substantive status conferences with the parties, Special Master Edwards determined that petitioners had failed to establish a prima facie case for compensation. Pet. App. 2a. Accordingly, on January 23, 1992, the special master issued an unpublished decision denying their claim. C.A. App. JA46. Consistent with the terms of the Act, the decision stated that, "in the absence of a motion for review filed pursuant to [RCFC] Appendix J, the clerk is directed to enter judgment dismissing the petition." No motion for review was filed, and judgment was entered dismissing the petition on February 25, 1992. C.A. App. JA46; 42 U.S.C. 300aa-12(e)(1) (Supp. IV 1992). Petitioners failed to file an election within 90 days of entry of judgment as required by 42 U.S.C. 300aa-21(a) (1988 & Supp. IV 1992). Accordingly, petitioners were deemed to have elected to accept judgment on or about May 26, 1992.

b. On January 4, 1993, petitioners filed a motion to vacate judgment pursuant to RCFC Rule 60(b) in order to have the judgment re-entered to afford themselves another opportunity to file an election—this time, to reject the judgment—so that they could pursue a civil action for damages. See Pet. 6-7; C.A. App. JA67-JA69. The substantive basis for their motion was that Special Master Edwards's two orders suspending their case were improperly issued and therefore the decisional deadline was never lawfully extended. According to petitioners, both suspensions were invalid because they were not issued upon a motion from either party, but rather were issued *sua sponte* by the special master. As a result,

petitioners claimed that the decision in their case was due on November 8, 1991, the decisional deadline as extended by the Chief Special Master's suspensions. Petitioners further argued that, after the decisional deadline lapsed, the special master automatically lost jurisdiction over the proceedings and that, therefore, his January 23, 1992 decision was invalid. The Secretary opposed petitioners' motion by asserting that neither the special master nor the Court of Federal Claims had jurisdiction to provide the type of post-judgment relief requested.

The Court of Federal Claims denied petitioners' motion. Pet. App. 1-12. The court held that in the absence of petitioners' filing a motion to review the special master's January 23, 1992 decision within the thirty-day time period provided under the Vaccine Act, the court lacked jurisdiction to consider a request for post-judgment relief. Pet. App. 5-7. In so holding, the court relied upon an earlier decision of the court of appeals that held that the filing of a motion for review within the thirty-day statutory time period is a prerequisite to the Court of Federal Claims' obtaining jurisdiction to grant post-judgment relief in a case filed under the Vaccine Act. *Widdoss* v. *Secretary of HHS*, 989 F.2d 1170, 1176-1177 (Fed. Cir.), cert. denied, 114 S. Ct. 381 (1993).

c. The court of appeals affirmed per curiam. Pet. App. 13. The court subsequently denied petitioners' combined petition for rehearing with a suggestion for rehearing in banc. Pet. App. 14-15.

ARGUMENT

1. Following the court of appeals' affirmance of the denial of petitioners' motion to vacate judgment, the court of appeals isued a published decision in *Patton* v. *Secretary of HHS* that further delineates the Court of Federal Claims' authority to consider motions for relief from judgment in Vaccine Act cases where there was no pre-judgment review of the result. *Patton* v. *Secretary of HHS*, No. 93-5187 (Fed. Cir. June 2, 1994), *reprinted in* the Appendix, *infra*. The court of appeals interpreted its prior decision in *Widdoss* v. *Secretary of HHS*, 989 F.2d 1170 (Fed. Cir.), cert. denied, 114 S. Ct. 381 (1993), which was the basis for the Court of Federal Claims' decision here. The court stated in *Patton* that *Widdoss* precludes Court of Federal Claims' consideration of a Rule 60(b) motion if the motion is being used "to circumvent the Vaccine Act's express procedure for seeking review of the merits of a special master's decision." *Patton*, App., *infra*, 14a. The court held that "the 30-day time limit of section 300aa-12(e)(1) presents no jurisdictional bar to the court's consideration of a Rule 60 motion where the movant does not seek review of the merits of the special master's decision, but rather requests correction of an error of the court." *Ibid.*[4] The court specifically explained that "[a]lthough the failure to file a timely motion seeking review of a special master's decision deprives the Court of Federal Claims

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[4] *Patton* involved a special master who had intended to make an additional award of compensation for pain and suffering, but who neglected to do so through inadvertence.

of jurisdiction to review the merits of that decision, it does not prohibit the court from granting relief from the judgment where the relief sought does not involve consideration of the merits of the case." *Ibid.*

That holding in the simultaneously pending *Patton* case (which presumably was applied here) reflects the particular statutory scheme at issue, as well as the settled principle, relied on in *Patton* (App., *infra*, 14a), that Rule 60(b) of the Federal Rules of Civil Procedure (of which the Rule here is a counterpart) "is not to be used as a substitute for an appeal" (citing *Ackermann* v. *United States*, 340 U.S. 193, 198-199 (1950)). It is a holding that does not conflict with that of any other court of appeals (since the question under this statutory scheme can arise only in the Federal Circuit) and that does not warrant this Court's review.

2. There was, in any event, no basis for a grant of Rule 60(b) relief in this case. Petitioners' underlying motion relies upon the alleged impropriety of Special Master Edwards in ordering two suspensions of his decisional deadline on November 1, 1991, and on January 2, 1992, purportedly without a requisite motion from one of the parties. 42 U.S.C. 300aa-12(d)(3)(C) (1988 & Supp. IV 1992); Vaccine Rule 9(a). On the merits, petitioners' motion could not produce relief from the February 25, 1992 judgment they seek to vacate.

a. Contrary to petitioners' assumption, it has never been established that the suspension orders were in fact issued without a motion from one of the parties. Pet. at 13. The absence of any written motions from either party requesting issuance of the

suspensions is not dispositive. Procedural motions before the special masters are not required to be written, and Vaccine Rule 20(a) specifically contemplates that motions may be made orally. See Vaccine Rule 20(a) ("A motion to the special master, unless made orally, shall be made in writing."). The special masters are permitted to and routinely do conduct pre-hearing proceedings "off the record," in keeping with the informal nature of claim adjudication under the Vaccine Program. See, *e.g.*, Vaccine Rule 5. It would at best be difficult to determine whether the suspensions about which petitioners complain were issued *sua sponte* or upon motion. There is, of course, a presumption that the special master carried out his duties in accordance with the law. See *Dolney* v. *Secretary of HHS*, 23 Cl. Ct. 337, 347, aff'd per curiam, 950 F.2d 730 (Fed. Cir. 1991).

b. Even if the special master improperly issued the suspensions (which did not temporally exceed his authority to suspend), that error would not warrant vacating the judgment. Such extraordinary relief is appropriate only upon a showing of exceptional circumstances. *Yachts America, Inc.* v. *United States*, 8 Cl. Ct. 278, 281 (citing *United States* v. *Atkinson*, 748 F.2d 659, 660 (Fed. Cir. 1984)), aff'd, 779 F.2d 656 (Fed. Cir. 1985), cert. denied, 479 U.S. 832 (1986); *Miner* v. *United States*, 14 Cl. Ct. 770, 774 (1988). Relief under Rule 60(b) is not appropriate where a party makes "free, calculated, deliberate choices" and those choices, rather than exceptional hardships, created the circumstances from which plaintiff seeks relief. *Ackermann* v. *United States*, 340 U.S. at 198. The propriety of the suspensions issued by Special Master Edwards in this case could have been challenged by a timely filed motion

for review of his January 23, 1992 decision. Petitioners' failure to make such a motion is not an "extraordinary" circumstance justifying post-judgment relief in the trial court.

c. Finally, even if the suspensions were issued *sua sponte* and even if they were therefore improper, petitioners are incorrect in claiming that the special master consequently lacked jurisdiction over the proceedings that ensued during the subsequent suspension periods and, in turn, that his decision was therefore invalid. Petitioners erroneously claim (Pet. 13-16) that Sections 12(g) and 21(b) of the Vaccine Act automatically divested the special master of jurisdiction over their petition once the original decisional deadline of November 8, 1991, had lapsed. Unless specifically provided by the governing statute, however, the violation of a decisional deadline does not divest the decision-maker of jurisdiction to render a valid decision. *Brock* v. *Pierce County*, 476 U.S. 253 (1986).[5] As amended in 1991, the Vaccine Act does not provide that the special masters automatically lose jurisdiction once a decisional deadline is passed. 42 U.S.C. 300aa-12(g) (Supp. IV 1992). To the contrary, Section 12(g) provides that, if the special master fails to issue a decision within the time period provided by the Act, he shall notify the

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[5] See also *Marshall Durbin Food Corp.* v. *ICC*, 959 F.2d 915, 919 (11th Cir. 1992) ("Courts have consistently rejected arguments that deadlines in the Interstate Commerce Act or other federal statutes are jurisdictional."); *Kinion* v. *United States*, 8 F.3d 639, 644 (8th Cir. 1993) (citing *Linemaster Switch Corp.* v. *EPA*, 938 F.2d 1299, 1304 (D.C. Cir. 1991)).

petitioner that petitioner may withdraw the petition or choose to remain under the Program.[6]

As originally enacted, Sections 12(g) and 21(b) did automatically divest the special master of jurisdiction in the event the special master did not follow the notice and opportunity to withdraw procedures, or, if they were followed, in the event the special master did not issue a decision within 30 days after providing the Section 12(g) notice.[7] However, those

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[6] That Section provides, in pertinent part:

> If * * * a special master fails to make a decision on a petition within the 240 days prescribed * * * (excluding * * * any period[s] of suspension[)] * * * the special master or court shall notify the petitioner under such petition that the petitioner may withdraw the petition under section 300aa-21(b) of this title or the petitioner may choose under section 300aa-21(b) of this title to have the petition remain before the special master or court, as the case may be.

42 U.S.C. 300aa-12(g) (Supp. IV 1992).

[7] Prior to the 1991 amendments, Section 12(g) provided that,

> the special master or court shall notify the petitioner under such petition that the petitioner may withdraw the petition under section [300aa-21(b) of this title] and *the petition will be considered withdrawn under such section if the petitioner, the special master, or the court do not take certain actions.*

Vaccine and Immunization Amendments of 1990, Pub. L. No. 101-502, § 5(b)(2), 104 Stat. 1286-1287 (1990) (emphasis added). Section 21(b)(2) formerly provided that,

> if the special master or the court does not enter a decision or make a judgment on a petition filed under section [300aa-11 of this title] within 30 days of the provision of the notice in accordance with section [300aa-12(g) of this title], *the special master or court shall no longer*

provisions were specifically revised by Congress to permit the special master to retain jurisdiction over a petition after a decisional deadline has passed. In 1991, Congress rescinded the portions of Sections 12(g) and 21(b) that automatically divested the special master of jurisdiction. See 42 U.S.C. 300aa-12(g), 300aa-21(b) (Supp. IV 1992). As a result of that change, the special master's jurisdiction no longer automatically terminates upon the expiration of a decisional deadline. See Health Information, Health Promotion, and Vaccine Injury Compensation Amendments of 1991, Pub. L. No. 102-168, Tit. II, § 201(d)(1), 105 Stat. 1102-1103 (1991); 137 Cong. Rec. H9360 (daily ed. Nov. 5, 1991).

As amended, Sections 12(g) and 21(b) only provide a mechanism by which the special master may lose jurisdiction once a decisional deadline is passed (see note 6, *supra*, and accompanying text). While exceeding the decisional deadline does impose upon the special master an obligation to start the process by which jurisdiction can be lost, until the process is completed, the special master retains jurisdiction. 42 U.S.C. 300aa-12(g) (Supp. IV 1992). Jurisdiction is not lost unless and until a petitioner chooses, in response to the notice issued under Section 12(g), to file a notice withdrawing the petition pursuant to Section 21(b). 42 U.S.C. 300aa-21(b) (Supp. IV 1992).

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have jurisdiction over such petition and such petition shall be considered as withdrawn under paragraph (1).

Pub. L. No. 101-502, § 5(f)(2), 104 Stat. 1287-1288 (1990) (emphasis added).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 1994

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

Nos. 93-5187, 94-5002

JAMES M. PATTON and JOANN PATTON,
Legal Guardians for THOMAS EDWARD PATTON,
PETITIONERS-APPELLANTS

v.

SECRETARY OF THE DEPARTMENT OF
HEALTH AND HUMAN SERVICES,
RESPONDENT-APPELLEE

Appealed from U.S. Court of Federal Claims
Judge Futey

[Filed June 2, 1994]

Before NEWMAN, MAYER, and LOURIE, *Circuit Judges.*

LOURIE, Circuit Judge.

James M. and Joann Patton, legal guardians for their son, Thomas Edward Patton, appeal from the June 7, 1993 judgment of the United States Court of Federal Claims [1] reinstating its earlier judgment of

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[1] Pursuant to Title IX of the Federal Courts Administration Act of 1992, Pub. L. No. 102-572, 106 Stat. 4506, the United

September 29, 1992 entered in accordance with a special master's decision awarding compensation for vaccine-related injuries under the National Vaccine Injury Compensation Program, but omitting an award for pain and suffering. *Patton v. Secretary of Dep't of Health & Human Servs.*, 28 Fed. Cl. 532 (1993) (opinion). The Pattons also appeal from a separate judgment denying their motion under Rule 60 of the Rules of the Court of Federal Claims to amend the September 29, 1992 judgment.[2] *Patton v. Secretary of the Dep't of Health and Human Servs.*, No. 90-1094 V (Ct. Fed. Cl. Aug. 5, 1993). We affirm-in-part, vacate-in-part, and remand.

BACKGROUND

On September 20, 1990, a petition was filed by the Pattons under the National Childhood Vaccine Injury Act of 1986, Pub. L. No. 99-660, § 311(a), 100 Stat. 3758 (codified as amended at 42 U.S.C. §§ 300aa-1 to 300aa-34 (1988 & Supp. II 1990)) ("the Act" or "Vaccine Act") seeking compensation for injuries allegedly sustained by their son after he received a diphtheria-pertussis-tetanus vaccination on December 24, 1959. The petition also contained claims requesting compensation for loss of earnings and pain and suffering pursuant to 42 U.S.C. § 300aa-15(a)(3), (4).

The case was assigned to a special master who conducted proceedings to determine whether the Pattons were entitled to an award, and if so, the amount

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States Claims Court was renamed the United States Court of Federal Claims effective October 29, 1992.

[2] The two appeals were consolidated by order of this court on October 29, 1993.

of such award. 42 U.S.C. § 300aa-12(d); Vaccine Rule 3. On April 20, 1992, the special master issued her decision, finding in favor of the Pattons on the issue of entitlement and determining the amount of compensation due. Pursuant to Vaccine Rule 10(b), the special master deferred ruling on the claims for pain and suffering and loss of earnings until she issued her decision regarding attorneys' fees and other costs. Both parties declined to seek review of the special master's decision and the Court of Federal Claims entered judgment in accordance with that decision on May 22, 1992. *See* 42 U.S.C. § 300aa-12(e)(3); Vaccine Rule 11(a). On June 15, 1992, the Pattons elected to accept the court's judgment. *See* 42 U.S.C. § 300aa-21(a); Vaccine R. 12(a).

In an application filed on July 6, 1992, and later amended on July 20, 1992, petitioners requested attorneys' fees and costs incurred in the proceeding before the special master pursuant to 42 U.S.C. § 300aa-15(e) and Vaccine Rule 13. On August 28, 1992, the special master awarded petitioners $16,157.01 for attorneys' fees and costs. Review of the special master's decision was not sought by either party and judgment was entered by the Court of Federal Claims in accordance with that decision on September 29, 1992. The special master's decision, however, did not address the Pattons' claims for compensation for pain and suffering and loss of earnings.

On November 11, 1992, the Pattons filed a "motion for relief" under Vaccine Rule 1 requesting that the special master amend her August 28, 1992 decision to award an additional $13,842.99 [3] as compensation for

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[3] That amount constituted the balance of the maximum award allowable under section 15 of the Act for lost earn-

pain and suffering and future earnings. The government opposed the Pattons' motion, arguing that the special master lacked jurisdiction under the Act to modify her decision once the Court of Federal Claims entered final judgment in accordance with that decision.

The special master rejected the government's jurisdictional challenge, concluding that jurisdiction does "not shift[] away from the Office of the Special Masters" absent a motion for review filed pursuant to 42 U.S.C. § 300aa-12(e)(1). In addition, the special master concluded that she possessed "inherent authority" to correct her own mistakes, similar to that of the Court of Federal Claims under Rule 60 of the Rules of the United States Court of Federal Claims (RCFC),[4] because "the power of the special master to do so can be assumed" and because such power is consistent with the mandate under Vaccine Rule 1 to "decide cases promptly and efficiently."

On the merits, the special master acknowledged that she had "inadvertently omitted an award for pain and suffering" in her August 28, 1992 decision awarding attorneys' fees and costs and issued an "Order to Amend" correcting that mistake on Janu-

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ings, pain and suffering, and attorneys' fees and costs when the vaccine was administered before the Act's effective date of October 1, 1988. 42 U.S.C. § 300aa-15(b) ($30,000 cap).

[4] RCFC 60 is a "virtual duplicate" of the Fed. R. Civ. P. 60. *See Information Sys. & Network Corp. v. United States*, 994 F.2d 792, 794 n.3 (Fed. Cir. 1993). *See also* RCFC, Foreword (revised effective March 15, 1992) ("The rules of the United States Court of Federal Claims are based upon the Federal Rules of Civil Procedure."). Therefore, we may rely on cases addressing Fed. R. Civ. P. 60 and we shall refer to RCFC 60 throughout the opinion as "Rule 60."

ary 11, 1993. Accordingly, she awarded the Pattons $13,842.99 for pain and suffering and emotional distress.

The government moved for review of the Order by the Court of Federal Claims. The government reasserted its contention that the special master was without jurisdiction under the Vaccine Act to modify her decision after it was reduced to a final judgment, notwithstanding that she had mistakenly omitted an award for pain and suffering. The Court of Federal Claims agreed, holding as a matter of law that a special master lacks authority to amend her decision once judgment is entered thereon by the court. *Patton*, 28 Fed. Cl. at 535-37. The court further rejected the special master's conclusion that she possessed inherent authority to grant Rule 60-type relief to correct her decision. The court found that Rule 60 is not incorporated into the Vaccine Rules and that those rules are devoid of any provision upon which such inherent authority can be based. *Id.* at 537-39.

Accordingly, on June 7, 1993, judgment was entered by the court vacating the special master's Order to Amend and reinstating the court's original judgment of September 29, 1992. On July 20, 1993, the Pattons moved for relief under Rule 60 from the court's judgment, requesting that the court amend the judgment to award damages for pain and suffering and emotional distress in the amount of $13,842.99. The motion was denied.

The Pattons now appeal from both the court's judgment reinstating the terms of the special master's original decision and the court's denial of their motion for relief under Rule 60.

DISCUSSION

I. Special Master's Authority to Amend

"[I]n a case arising under the 1989 amendments to the Vaccine Act,[5] we review *de novo* the [Court of Federal Claims'] determination as to whether or not the special master's decision was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. In effect, then, we review the underlying decision of the special master under the . . . standard[s] of § 300aa-12(e)(2)(B)." *Hines v. Secretary of the Dep't of Health & Human Servs.*, 940 F.2d 1518, 1524 (Fed. Cir. 1991). *See also Edgar v. Secretary of the Dep't of Health & Human Servs.*, 989 F.2d 473, 475 (Fed. Cir. 1993); *Bradley v. Secretary of the Dep't of Health & Human Servs.*, 991 F.2d 1570, 1574 (Fed. Cir. 1993); *Grant v. Secretary of the Dep't Health & Human Servs.*, 956 F.2d 1144, 1146 (Fed. Cir. 1992). Whether the special master has jurisdiction to amend her decision after the Court of Federal Claims has entered judgment thereon is a legal question which we review *de novo*. *See Widdoss v. Secretary of Health & Human Services*, 989 F.2d 1170, 1174 (Fed. Cir.), *cert. denied*, 114 S. Ct. 381 (1993); *Whitecotton v. Secretary of the Dep't Health & Human Servs.*, 17 F.3d 374, 376 (Fed. Cir. 1994).

In granting the government's motion to vacate the special master's Order to Amend, the trial court

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[5] The amendments under the Omnibus Budget Reconciliation Act of 1989, Pub. L. 101-239, § 6601(1)(1), 103 Stat. 2106, 2290 (1989) apply to petitions filed after December 19, 1989 and to pending petitions in which the evidentiary record was not closed. 42 U.S.C. §§ 300aa-10 note (1) (Supp. I 1989).

found that there was no legal basis to support the special master's conclusion that she retained jurisdiction to correct her decision after a judgment was entered by the court. The court identified two events by which the special master is divested of jurisdiction under the Vaccine Act. First, if a motion for review is filed by either party within 30 days of the issuance of a special master's decision, the Court of Federal Claims assumes exclusive jurisdiction over the case.[6] *See* 42 U.S.C. § 300aa-12(e)(2). Once such a motion is properly filed, jurisdiction passes to the court and the special master's jurisdiction reattaches only if the case is subsequently remanded for further action. *See* 42 U.S.C. § 300aa-12(e)(2)(C). Second, if the parties fail to seek review of the special master's decision within the 30-day period, then jurisdiction is lost once the clerk of the Court of Federal Claims enters judgment in accordance with that decision. *See* 42 U.S.C. § 300aa-12(e)(3). It is the latter situation that exists here.

The Pattons maintain that the trial court erred in concluding that the special master did not retain jurisdiction to amend her decision after the court entered final judgment in accordance with that decision. The Pattons assert that authority for the special master's continuing jurisdiction can be found in Rule 60 of the Rules of the Court of Federal Claims, the Vaccine Rules, and the "inherent" powers of the special master. We will consider each of these alleged bases of authority in turn.

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[6] This is analogous to the general rule applicable to the federal courts that jurisdiction immediately transfers from a district court to an appellate court once an appeal is perfected. *See* 9 James W. Moore *et al., Moore's Federal Practice* ¶ 203.11 (2d ed. 1993).

First, the Pattons argue that a special master possesses authority equivalent to that of the Court of Federal Claims under Rule 60 to amend or correct her decision after a judgment has been entered. The Pattons argue that although their failure to file a timely motion for review under section 300aa-12(e)(1) prohibits the court from reviewing the merits of the special master's decision, the special master nevertheless retains Rule 60-type authority to amend her decision.

In asserting that the power of the Court of Federal Claims to grant relief from judgment under Rule 60 is also available to a special master, the Pattons ignore the distinction between the Rules of the Court of Federal Claims and the Vaccine Rules, which govern practice and procedure for the proceedings of the court and the special masters, respectively. Unlike the court, which has express authority under its Rule 60 to afford relief from a final judgment, a special master is without such power under the Vaccine Rules.[7]

The RCFC apply to special masters "only to the extent referenced" in the Vaccine Rules, Vaccine R. 1, and the Pattons concede that the provisions of Rule 60 have not been so referenced.[8] As the tribunal charged with setting out the rules governing proceedings before the special masters, *see* 42 U.S.C. § 300aa-12(d)(2), the Court of Federal Claims apparently

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[7] The Vaccine Rules are set out in Appendix J of the Rules of the Court of Federal Claims.

[8] In contrast, other Rules have been duly referenced. *See, e.g.*, Vaccine Rule 7(c) (referencing RCFC 45); Vaccine Rule 8(e) (referencing RCFC 59(b) and 80); Vaccine Rule 14(a), (c) (referencing RCFC 81(b), respectively), Vaccine Rule 24 (referencing RCFC 82).

chose to reserve the power to grant Rule 60-type relief for itself, withholding such power from the special masters. *See Donovan v. Secretary of the Dep't of Health & Human Servs.*, 28 Fed. Cl. 459, 461, 462 (1993), *aff'd*, 17 F.3d 1442 (Fed. Cir. 1994) (table). Thus, a special master may not avail herself of the authority conferred by Rule 60.

Alternatively, the Pattons argue that the ability of the special master to grant relief from a decision after judgment has been entered is authorized by Vaccine Rule 1, which entitles the special masters to "regulate the applicable practice, consistent with these rules and with the purpose of the Vaccine Act, to decide cases promptly and efficiently." We reject the Pattons' overly broad reading of Vaccine Rule 1. The rule expresses the Vaccine Act's underlying objective to provide expeditious and conclusive resolution of vaccine-injury claims. *See* H.R. Rep. No. 908, 99th Cong., 2d Sess. 17 (1986), *reprinted in* 1986 U.S.C.C.A.N. 6287, 6358. That general mandate, however, cannot be interpreted as endowing special masters with powers contemplated neither by Congress in enacting the Vaccine Act nor by the Court of Federal Claims in promulgating the Vaccine Rules. The discretion afforded special masters under Vaccine Rule 1 may not be exercised in a manner that would disturb or exceed the framework laid out by the Court of Federal Claims pursuant to its authority under the Act. *Cf. United States v. Sherwood*, 312 U.S. 584, 589-90 (1941) ("An authority conferred upon a court to make rules of procedure for the exercise of its jurisdiction is not an authority to enlarge that jurisdiction[.]").

Notwithstanding the absence of any express provision authorizing a special master to amend her deci-

sion after a judgment has been entered, the Pattons argue that special masters have "inherent" power, independent of any statute or rule, to grant relief from their decisions. The Pattons point to the "historical" authority of federal courts to correct or amend their judgments, now codified at Fed. R. Civ. P. 60(a), and insist that special masters possess a similar capability.[9]

The Pattons fail to recognize that special masters are not provided with the same powers as federal courts. Established under Article III of the U.S. Constitution, federal courts have "plenary power . . . to modify [a] judgment for error of fact or law or even revoke it altogether." *Zimmern v. United States*, 298 U.S. 167, 169-70 (1936). The 1938 promulgation of Rule 60(a) of the Federal Rules of Civil Procedure, which permits a federal court to correct clerical mistakes and errors arising from oversight or omission, expressly recognized "a power that the courts always have had." 11 Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2854 (1973 & Supp. 1993).

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[9] In making this argument, the Pattons seem to suggest that the Court of Federal Claims possesses the same powers as the Article III courts. That court was established by Congress under its Article I powers, 28 U.S.C. § 171(a) (1988), and it is not entitled to exercise the "judicial Power of the United States" bestowed exclusively by the Constitution on Article III courts. *See Northern Pipeline Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 58-60 (1982) (plurality opinion). Whether the Court of Federal Claims has "inherent" power to correct its judgments apart from that expressly conferred under Rule 60(a) need not be addressed here. The comparison being made by the Pattons is one between the special master and Article III courts, not between the Court of Federal Claims and Article III courts.

In contrast, the Office of Special Masters owes its existence to and derives its powers from the Vaccine Act. *See* 42 U.S.C. § 300aa-12(c), (d). As a "creature of statute . . . [a]ny and all authority pursuant to which [a special master] may act ultimately must be grounded in an express grant from Congress." *Killip v. Office of Personnel Management*, 991 F.2d 1564, 1569 (Fed. Cir. 1993). Thus, any authority held by the special masters to correct decisions must flow from the Vaccine Act or its implementing Vaccine Rules, and not from any "inherent" source of power. In the absence of any express provision allowing the special master to grant Rule 60-type relief, the special master's involvement in the case ends, as a matter of law, once the period for seeking review of her decision expires and judgment is entered by the Court of Federal Claims. *See Grimes v. Secretary of the Dep't of Health & Human Servs.*, 988 F.2d 1196, 1198 (Fed. Cir. 1993).

Finally, the Pattons contend that because the special master did not dispose of their claims for compensation for pain and suffering in her August 28, 1992 decision awarding attorneys' fees and costs, that decision constituted an interlocutory decision on which a final judgment could not be entered. That argument, however, disregards the decisional scheme established under the Vaccine Rules.

Under Vaccine Rule 13, a special master's decision on compensation for attorneys' fees and costs is separate from her decision on compensation for vaccine-related injury for purposes of seeking review by the Court of Federal Claims under Vaccine Rule 11. Additionally, for certain "retrospective cases," such as the instant case, in which the vaccine recipient is not deceased and the vaccine was administered prior to

October 1, 1988, Vaccine Rule 10(b) provides that the special master shall postpone deciding compensation for pain and suffering until she issues her decision on attorneys' fees and costs. Upon expiration of the 30-day time limit or upon notice that the parties waive their review rights, the clerk of the Court of Federal Claims is mandated to enter judgment "immediately" in accordance with the special master's decision. *See* 42 U.S.C. § 300aa-12(e)(3); Vaccine Rule 11(a).

In the instant case, the special master issued two separate decisions: one awarding compensation for injury and one awarding attorneys' fees and costs. That she failed to rule on the claims for pain and suffering when she awarded attorneys' fees and costs does not render that decision "interlocutory." The 30-day filing period runs from "issuance of the special master's decision," 42 U.S.C. § 300aa-12(e)(1), and the mandate to enter judgment after the filing period expires does not require that the decision must have expressly addressed all the issues. Thus, the special master's decision was properly reduced to a final judgment after the parties failed to seek review within the 30-day time limit.

II. Relief from Judgment

The Pattons also appeal from the judgment of the Court of Federal Claims denying their motion under Rule 60 requesting that the court amend its judgment of September 29, 1992 and award compensation for pain and suffering. However, before we review the trial court's ruling, we must first address the question whether the court had jurisdiction to rule on the Pattons' Rule 60 motion in the absence of a

timely motion for review. We have plenary authority to consider whether the lower tribunal's assertion of jurisdiction was correct, *see Galloway Farms, Inc. v. United States*, 834 F.2d 998, 1000 (Fed. Cir. 1987), and we may address this issue *sua sponte*, *see Lake County Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391, 398 (1979).

We considered the jurisdictional implications of the failure to comply with the 30-day time limit to file a motion for review under section 300aa-12(e)(1) in *Widdoss v. Secretary of Health & Human Services*, 989 F.2d 1170 (Fed. Cir.), *cert. denied*, 114 S. Ct. 381 (1993). In *Widdoss*, the petitioner filed her petition for review 31 days after issuance of the special master's decision denying compensation. Because the petition was untimely under section 300aa-12(e)(1), final judgment was entered in accordance with the special master's decision pursuant to section 300aa-12(e)(3). The petitioner moved for relief under Rule 60(b), "urging that the Claims Court vacate the judgment and review the merits of the case." *Id.* at 1174. The trial court granted the motion and reversed the special master's decision.

On appeal, we held that the trial court lacked jurisdiction to entertain and rule on the merits of the petitioner's Rule 60(b) motion. In so holding, we concluded that "the 30-day time period in which to file a motion for review under section 300aa-12(e)(1) is jurisdictional," *id.* at 1177, and that the trial court erred in "employing [Rule] 60(b) to create jurisdiction to review the merits of the petition," *id.* at 1178.

In the instant case, the trial court did not consider *Widdoss* as barring it from considering the Pattons' Rule 60 motion, despite the fact that neither party filed a motion for review within the 30-day time

limit. It concluded that "[w]hile the court recognizes that it cannot invoke RCFC 60(b) to review the merits of a special master's decision in the absence of a timely motion for review, *Widdoss v. Secretary DHHS*, [989 F.2d 1170 (Fed. Cir. 1993)], the court does not interpret the *Widdoss* decision or the Vaccine Act as precluding the court from invoking RCFC 60(b) to relieve a party from a judgment for the limited purposes listed in this rule." 28 Fed. Cl. at 539-40 n.13.

Our holding in *Widdoss* that Rule 60(b) cannot be used to circumvent the Vaccine Act's express procedure for seeking review of the merits of a special master's decision is consistent with the settled principle that the rule is not to be used as a substitute for an appeal. *See Ackermann v. United States*, 340 U.S. 193, 198-99 (1950). A petitioner may not attempt to do indirectly through Rule 60(b) that which it is prohibited from doing directly under the appeals process prescribed by the Act. However, we agree with the trial court that the 30-day time limit of section 300aa-12(e)(1) presents no jurisdictional bar to the court's consideration of a Rule 60 motion where the movant does not seek review of the merits of the special master's decision, but rather requests correction of an error of the court. Although the failure to file a timely motion seeking review of a special master's decision deprives the Court of Federal Claims of jurisdiction to review the merits of that decision, it does not prohibit the court from granting relief from the judgment where the relief sought does not involve consideration of the merits of the case, but comes within the requirements of Rule 60.

Unlike the petitioner in *Widdoss*, the Pattons do not challenge the findings or conclusions underlying the special master's decision to award compensation for a vaccine-related injury and attorneys' fees and costs. Instead, they request that the court amend the final judgment to reflect the special master's actual stated intent to award compensation for pain and suffering, which was not realized due to the special master's acknowledged inadvertence and error. Thus, the error from which the Pattons seek relief is not one regarding the merits of the special master's decision, but simply the failure of the special master to effectuate her intent to award compensation for pain and suffering. Because the Pattons did not attempt to appeal the merits of the special master's decision in a manner inconsistent with the "carefully circumscribed appellate process under the Vaccine Act," *Widdoss*, 989 F.2d at 1178, we conclude that the court did not impermissibly extend its jurisdiction beyond that prescribed by Congress in considering the Rule 60 motion.

Having concluded that the trial court had jurisdiction over the Rule 60 motion, we now address the propriety of the trial court's denial of the motion. As a preliminary matter, the parties dispute the appropriate standard of review applicable to this issue. The Pattons argue that we should review the court's decision *de novo*, *see Dehne v. United States*, 970 F.2d 890, 892 (Fed. Cir. 1992), because it was "apparently based upon a finding of a lack of jurisdiction." The government, on the other hand, contends that the decision whether to grant or deny Rule 60 relief is within the discretion of the trial court, which we should review for abuse of discretion. *See Information Sys.*, 994 F.2d at 794.

We agree with the government that the trial court's ruling should be reviewed on an abuse of discretion basis. As discussed above, it is clear from the court's reasoning that the denial of the Pattons' motion for relief from judgment was based not on a lack of jurisdiction but on the court's conclusion that the Pattons were not entitled to such relief for failure to pursue pre-judgment remedies.

"An abuse of discretion exists when, *inter alia*, the lower court's decision was based on an erroneous conclusion of law or on a clearly erroneous finding of fact." *Broyhill Furniture Indus., Inc. v. Craftsmaster Furniture Corp.*, 12 F.3d 1080, 1083, 29 USPQ2d 1283, 1285 (Fed. Cir. 1993). A court's misinterpretation or misapplication of its own rules is an error of law. *See id.* at 1087, 29 USPQ2d at 1288; *Sherwood*, 312 U.S. at 589-90.

Rule 60(a) affords relief from minor clerical mistakes or errors arising from simple oversight or omission. *See* 6A James W. Moore and Jo Desha Lucas, *Moore's Federal Practice* ¶ 60.06[1] (2d ed. 1993); *see also United States v. Bealey*, 978 F.2d 696, 699 (Fed. Cir. 1992). It is intended to allow the judgment to "speak the truth," but not to substantially alter the rights of the parties thereto. *See Wright & Miller*, *supra*, § 2854. Errors of a more substantial nature are more appropriately correctable under subdivision (b).[10] *See* Moore, *supra*, ¶ 60.06[4].

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[10] Subsection (b) provides in pertinent part that

> [o]n motion and upon such terms as are just, the court may relieve a party or the party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time

The failure of the special master to rule on the Pattons' claims for compensation for pain and suffering was more than a mere clerical error or oversight. Awarding compensation for pain and suffering is a discretionary matter and does not follow as of right when an award of compensation for vaccine-related injuries is made. Nor does an award for pain and suffering necessarily follow when the special master allows an award for attorneys' fees in a deferred ruling pursuant to Vaccine Rule 10(b). Thus, if relief from judgment is to be had in this case, it must be obtained under Rule 60(b). *See Scola v. Boat Frances, R., Inc.*, 618 F.2d 147, 153 (1st Cir. 1980) (subdivision (a) covers those omissions or mistakes resutling from a court's failure to perform a ministerial duty, as opposed to a deliberative or discretionary act addressable by subdivision (b)).

In denying the motion, the trial court concluded that "[r]elief from judgment is not merited in the instant case . . . where the error that petitioners allege as a legal basis for relief that they requested was capable of being raised before judgment was

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to move for a new trial under Rule 59(b); (3) fraud, whether denominated intrinsic or extrinsic, misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation.

entered." 28 Fed. Cl. at 540 n.13. Thus, despite acknowledging that the absence of a timely motion for review did not divest it of authority to grant Rule 60 relief, the trial court nevertheless concluded that the Pattons were not entitled to such relief because a timely motion for review was not filed.

The practical effect of the trial court's circular reasoning is to preclude access to the post-judgment remedies of Rule 60(b) whenever pre-judgment remedies are not pursued. Consequently, according to the trial court, the only means available to correct a mistake by the special master is to file a timely motion for review under section 300aa-12(e)(1). That restrictive view of the availability of Rule 60(b) relief renders the rule a legal nullity and is inconsistent with its purposes.

As a remedial provision, Rule 60(b) is to be "liberally construed for the purpose of doing substantial justice." 7 Moore, *supra*, ¶¶ 60.18[8], 60.19; *see also Klapprott v. United States*, 335 U.S. 601, 609, *modified*, 336 U.S. 942 (1949). Under Rule 60(b)(1), relief may be granted from "judicial error" when inadvertence is shown and the motion is made within a reasonable time. *See CRI, Inc. v. Watson*, 608 F.2d 1137, 1143 (8th Cir. 1979). That the problems encountered by the Pattons may have been avoided had they sought correction before judgment was entered is not itself a sufficient basis to preclude relief under Rule 60(b). The exhaustion of pre-judgment remedies is not a mandatory condition precedent for obtaining post-judgment relief under Rule 60(b).[11]

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[11] *Wilson v. Secretary of the Dep't of Health & Human Servs.*, 23 Cl. Ct. 169 (1991), *aff'd*, 960 F.2d 156 (Fed. Cir. 1992) (table), is not to the contrary. In *Wilson*, the Claims Court held that the withdrawal of a motion for review under

The rule, by its very nature, affords relief within a reasonable time *after* a final judgment is entered and cannot be invoked before the entry of judgment on the special master's decision. *See* Fed. R. Civ. P. 60 advisory committee's note to 1946 amendment (60(b) applies only to final judgments).

It is undisputed, and the special master's Order to Amend makes abundantly clear, that it was the intention of the special master to award compensation for pain and suffering and that "[t]he omission of such award was inadvertently and mistakenly overlooked." Congress has specifically provided that pain and suffering associated with a vaccine-related injury should be adequately compensated for by means of a monetary award.

Nonetheless, while we hold that the court erred in concluding that the exhaustion of pre-judgment remedies is a prerequisite to seeking relief under Rule 60(b), and while it is not apparent to us that reasons otherwise exist here for denying such relief in view of the admission by the special master that an award of compensation for pain and suffering was inadvertently omitted, we are reluctant to decide a matter which has not been fully developed by the trial court and which is committed to its discretion. The trial court's order denying the motion for relief provides no findings of fact or conclusions of law other than that contained in footnote 13 of its June 4, 1993

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section 300aa-12(e)(1) deprived the court of jurisdiction to entertain a Rule 59 motion for reconsideration. Although we affirmed a conclusion that the failure to pursue pre-judgment remedies resulted in the inability of the court to provide post-judgment relief, the post-judgment relief sought in that case, as in *Widdoss*, was directed to the merits of the special master's decision.

opinion, which we hold inadequate as a matter of law to sustain denial of Rule 60(b) relief. Where no adequate basis exists upon which to review the appealed judgment due to insufficient findings of fact and conclusions of law, the judgment should be vacated and the action remanded for further consideration. *See ACS Hosp. Sys., Inc. v. Montefiore Hosp.*, 732 F.2d 1572, 1578, 221 USPQ 929, 933 (Fed. Cir. 1984). Accordingly, we vacate the court's judgment of August 5, 1993 denying the Pattons' Rule 60 motion and remand the case to the trial court to reconsider whether the Pattons are entitled to relief under Rule 60(b).

CONCLUSION

The trial court correctly held that the special master was without authority to amend her decision once final judgment was entered thereon pursuant to 42 U.S.C. § 300aa-12(e)(3). The court also correctly concluded that failure to file a motion for review within the 30-day time limit of 42 U.S.C. § 300aa-12(e)(1) did not divest the court of jurisdiction to entertain a Rule 60 motion for relief from judgment when that motion does not seek review of the merits of the special master's decision. However, because the court's judgment denying post-judgment relief was based on incorrect reasoning and was not otherwise supported by sufficient findings of fact or conclusions of law, the judgment is vacated and the case is remanded for reconsideration of the motion.

COSTS

Costs to the Pattons.

AFFIRMED-IN-PART, VACATED-IN-PART, AND REMANDED

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No. 93-1950

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

ROSE A. DONOVAN and CHARLES A. DONOVAN,
Parents of TRALANE DONOVAN,

Petitioners,

vs.

DONNA E. SHALALA,
Secretary of Health and Human Resources,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITIONERS' REPLY BRIEF

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PETITIONER'S REPLY BRIEF

Respondent's arguments highlight why this Court should grant the petition. A little over two weeks after the petition for *writ of certiorari* was filed herein, the court of

appeals issued a published decision on *Patton v. Secretary of HHS*, No. 93-5187 (Fed. Cir. June 2, 1994), reprinted in the Appendix, Brief for the Respondent in Opposition. This decision affirms and expounds on the pertinent points of law on which petitioner relied upon in the lower courts and in this petition, as follows:

1. It has been petitioners' contention before the court of federal claims and the court of appeals that the federal court of claims has jurisdiction to relieve a party from a judgment under RCFC Rule 60(b) for the limited purposes listed in the Rule.

2. It has been petitioners' contention before the court of appeals that the failure to file a timely motion seeking review of a master's decision does not prohibit the court of federal claims from granting relief from a judgment where the relief sought does not involve consideration of the merits of the case and falls within the requirements of RCFC Rule 60.

3. Petitioners' herein have never challenged the findings or conclusions underlying the special master's decision to deny to award compensation for a vaccine related injury to Tralane Donovan or appealing the merits of the judgment.

4. Notwithstanding the above, the federal court of claims denied petitioners' motion for Rule 60(b) relief precisely because it found it lacked jurisdiction to even consider the motion relying on *Widdoss v. Secretary DHHS*, [989 F.2d 1170 (Fed.Cir. 1993)]. *Per curiam*, the Court of Appeals affirmed.

5. The crux of the petition before the court is whether *Widdoss* or *Patton* should apply. It is respectfully submitted that under the facts of this case, the courts below should have applied the rule later set forth in *Patton* and heard the petitioners' motion for Rule 60(b) relief on the merits.

6. Because the decision by the court of appeals in this matter was *per curiam*, respondent's assertion that the holding in *Patton* was applied by the court in this case is pure conjecture and speculation. In fact, the court of appeals erred in affirming the court of federal claim's refusal to grant post judgment relief in this Vaccine Act case by not applying the rule now affirmed and delineated in *Patton*.

Conclusion

For the foregoing reasons, the petition for a *writ of certiorari* should be granted.

Respectfully submitted,

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